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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 768.

OCTOBER TERM, 1961.

LOCAL UNION 760, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,
vs.
DR. J. W. PRESLEY, FRED CHANIOTT, GORDON POWELL, CLARENCE E. FARRIS and MORRIS GOLDSTEIN, Composing the Board of Public Utilities of the City of LaFollette, Campbell County, Tennessee,
Respondents.

RESPONDENTS' BRIEF

In Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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RESPONDENTS' BRIEF

In Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE.

The City of LaFollette, Tennessee, owns an electric power distribution system which serves residents of LaFollette and adjacent areas. The system is operated by a Board, the members of which have been sued in this action.[1]

[1] Provision for the Board was made by an ordinance authorized by Chapter 32, Public Acts of Tennessee, 1935 ("The Municipal Electric Plant Act of 1935"), Tennessee Code Annotated, 6-1501 et seq. (The Complaint, paragraph IV, R3a.) The material provisions of this Act are set forth in appendix I to this brief.

To carry out its functions the Board entered into a contract with TVA whereby the Board purchases electricity for distribution and sale.

On May 10, 1960, petitioner, a labor union, some of whose members, it is alleged, are employed by the Board, filed a bill for declaratory judgment (R2-4a) in the United States District Court for the Eastern District of Tennessee in which it sought to have the District Court construe 16 USC 831b, a section of the Tennessee Valley Authority Act of 1933, 16 USC 831, et seq., and declare the rights and obligations of the parties thereunder. The relevant part of section 831b provides as follows:

> "All contracts to which the Corporation is a party and which require the employment of laborers and mechanics in the construction, alteration, maintenance, or repair of buildings, dams, locks and other projects shall contain a provision that not less than the prevailing rate of wages for work of a similar nature prevailing in the vicinity shall be paid to such laborers or mechanics."
>
> . . . . . .
>
> "Where such work as is described in the two preceding paragraphs is done directly by the Corporation the prevailing rate of wages shall be paid in the same manner as though such work had been let by contract."

Petitioner's thesis is that because the Board purchases electric current from TVA it thereby becomes "a unit of the TVA system" and that the Board's acts are thereby "inextricably interwoven with the acts of the United States Congress as set forth in 16 USCA 831 so as to form the TVA system." (Complaint, paragraphs V and VI, R3a). This in turn is averred to require compliance by the Board with the prevailing wage provision of 16 USC 831b.

In response the Board filed a motion to dismiss (R4-5a) which the District Court sustained. In its memorandum

(R5-7a) the District Court said: "Obviously section 831b relates only to government contracts for construction, maintenance, etc., on TVA properties, which contracts necessarily involve the employment of laborers and mechanics", and not to laborers and mechanics employed by the Board ". . . to maintain its system for the distribution of power purchased from TVA." The District Court's order recites that "the Court has no jurisdiction of this action and that no claim upon which relief can be granted has been stated under said (16 USC 831b) statute" (R8a).

On appeal the United States Court of Appeals for the Sixth Circuit affirmed the dismissal of the case by order dated December 5, 1964. This order is reported in 296 F. (2d) 731.

ARGUMENT.

Petitioner asks that two questions be reviewed: (1) Did the District Court "have jurisdiction based on . . . 16 USCA 831, in an action for a declaratory judgment . . .", and (2) Does 16 USC 831b apply to "laborers and mechanics" employed by a municipal electric plant by reason of the fact that the municipal electric plant contracts with TVA for the purchase of power, which power the municipal plant sells and distributes.

Discussion of Question One.

The Complaint Was Dismissed for Failure to State a Claim Under 16 USC 831b Upon Which Relief May Be Granted. The Dismissal, Therefore, Does Not Give Rise to the Jurisdictional Issue Expressed in Question One.

The District Court in the course of its memorandum opinion states that "The Court announced from the bench that it did not have jurisdiction of the case" (R5a). The District Court's order dismissing the action contains the statement "that the Court has no jurisdiction of this action" (R8a). These statements have evidently prompted respondent to raise the jurisdictional issue stated in Question One.

However, the District Court's memorandum opinion and the order thereon, which are briefly referred to above, clearly show by express recitals that the District Court dismissed the case on the ground that 16 USC 831b does not afford petitioner a basis for judgment—that is, on the merits of the case—and not for lack of jurisdiction.[2]

[2] See Bell v. Hood, 327 U. S. 678, 682, where it is said: "whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed juris-dic-

This being true, Question One does not state an issue of present relevance to the case.

Discussion of Question Two.

The District Court and Court of Appeals Correctly Determined That 16 USC 831b Does Not Apply to Laborers and Mechanics Employed by the LaFollette Board of Public Utilities.

Section 831b spells out with precision the area within which the "prevailing wage" provision is operative. By the terms of section 831b, the prevailing wage provision must be construed to apply only when "laborers and mechanics" of the contracting party are performing work relative to ". . . buildings, dams, locks or other projects . . ." **operated by or to be operated by TVA.** The fourth paragraph of section 831b requiring payment of the prevailing wage when "work . . . is done directly by the corporation" does not admit of the construction contended for by petitioner. The language of this paragraph manifests Congress' recognition that the work contemplated by section 831b could be done in one of two ways — by the TVA itself or by an independent contractor. These alternative methods can have no relevance to the work of city owned agencies which distribute TVA's "surplus power" sold to them under the authority of 16 USC 831i, for this type of work, under the plan of the statute, could never be work "done directly by the Corporation."

Section 831b, moreover, applies only when laborers and mechanics are performing one of the functions described in the statute. Hence, if a laborer or mechanic is not engaged in constructing, altering, maintaining or repairing

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tion over the controversy. *If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction . . .*" (Emphasis ours.)

a building, dam, lock or similar project,[3] the wage provision has no application. "No intimation was made", said the District Court (R7a), that the Board's employees were engaged in the required work, nor can the complaint be so construed. To the contrary, as appears from the complaint, the petition and Tennessee Code Annotated 6-1503, the statute pleaded by petitioner and under which the creation of the Board was authorized, the Board's employees are only engaged in work incident to the retail distribution of electricity.

The petitioner repeatedly states that the Board's contract with TVA was entered into in conformity with section 831b. This insistence ignores 16 USC 831i, which plainly is the relevant section of the TVA act in this instance, inasmuch as it governs TVA's sales of electricity to municipalities and similar organizations.[4]

Section 831i sets forth in detail the terms and conditions upon which such sales can be made, but, significantly, it contains no express reference to any wage requirement, much less to a requirement that the contracting municipality pay its employees the prevailing wage as determined by the Secretary of Labor. In the absence of such a provision in section 831i of the Act, it must be concluded that Congress did not condition the sale of TVA power to municipalities upon the requirement that the contracting municipality pay its employees a prevailing wage.

Petitioner argues that since TVA is authorized to regulate the resale rate of power sold to municipalities it must

[3] Under the rule of ejusdem generis, the term "project", as used in the second paragraph of 16 USCA 831b, relates to projects similar to those specifically designated in the statute, i. e., "buildings, dams, locks". For a statement of this familiar rule, see e. g. Webb v. Board of Trustees of Webb School, 38 Tenn. App. 173, 198, 271 S. W. 2d 6 (1954).

[4] 16 USC 831i is set forth as appendix 2 to this brief.

also have the right to regulate the wages of employees of the municipalities to whom power is sold. This conclusion is unsound. TVA may indeed establish resale rate schedules as a part of its power contracts with municipalities, but it may do so only because of the clear authorization of section 831f. There is, however, no such corollary provision in section 831i (or for that matter in section 831b) which gives TVA the additional right to regulate the wages of the municipality's employees. The statute expressly permits the regulation of resale rates but not of wages.

Section 831i contains the provision ". . . That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Chapter . . ." Neither the statute itself nor the legislative history gives credence to the view that the power to establish "terms and conditions" in a power contract was intended by Congress to grant TVA the right to control the wages of the Board's employees. But even if this vague language were construed to evince such an intent, the petitioner here cannot avail itself of this section because its complaint does not aver that TVA invoked that power in contracting with the Board.[3]

Petitioner errs in its statement (pages 9-10) that it is "undisputed" that the Board's contract with TVA is, ". . . squarely within the provisions of 16 USCA 831 (b)" for this is the essence of the dispute. This dispute exists solely because petitioner has refused to give meaning to

[3] Petitioner's references to discrimination on pages 5 and 7 of its petition are misleading and unwarranted. Discrimination is not an issue in this case. Until the filing of this petition, discriminatory practices and racial discrimination had never been mentioned or even alluded to in the pleadings or briefs of either party.

section 831b in its entirety and because of petitioner's refusal to read it in context with section 831i. Throughout the history of this case petitioner has consistently ignored section 831i and instead has concentrated its efforts on giving section 831b an elliptical construction. This is illustrated on pages 9-10 of the petition where it is said by clear implication that the phrase "All contracts to which the Corporation is a party . . ." should be construed in isolation from the rest of the sentence. This method of construction omits any reference to the significant words which modify the phrase "all contracts".

The legislative history of the TVA Act discloses nothing which supports the petitioner's position. Petitioner's references to statements of Congressmen are not germane. To our knowledge the only reference to section 831b's prevailing wage provision in the legislative history is contained on page 10 of the House of Representative's Majority Report, submitted on April 10, 1933, by Congressman McSwain to accompany HR 5081. The report says:

> "In like manner all agents, employees, and laborers will be entitled to have the Secretary of Labor settle any dispute concerning wages. The prevailing rate of wages, as it is defined in the act, will be the measure of wages paid [to TVA employees]. The same principle will apply to employees and laborers working for **contractors** upon **projects** under contract with the Authority" (Emphasis added).

The language supports our contention that the prevailing wage clause of section 831b relates only to employees of companies which have contracts with TVA for the construction and maintenance, etc., of projects which are owned and operated by TVA.

The Court of Appeals properly affirmed the action of the District Court in dismissing petitioner's complaint.

and no significant question is presented by the petition. Accordingly, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX 1.

Material Portions of Tennessee Municipal Electric Plant Law of 1935 as Contained in Tennessee Code Annotated.

"**Section 6-1503. Powers of municipalities.**

"(a) To acquire, improve, operate and maintain within and or without the corporate or county limits of such municipality, and (with the consent of such other municipality) within the corporate or county limits of any other municipality, and electric plant and to provide electric service to any person, firm, public or private corporation, or to any other user or consumer of electric power and energy and to charge therefor.

"(g) To make contracts and execute instruments containing such covenants, terms and conditions as in the discretion of the municipality may be necessary, proper or advisable for the purpose of obtaining loans from any source, or grants, loans or other financial assistance from any federal agency; to make all other contracts and execute all other instruments as in the discretion of the municipality may be necessary, proper or advisable in or for the furtherance of the acquisition, improvement, operation and maintenance of any electric plant and the furnishing of electric service; and to carry out and perform the covenants and terms and conditions of all such contracts and instruments.

"**Section 6-1507. Creation of board.** Any municipality, excepting those which employ a city manager or which have a population of less than two thousand (2,000), issuing bonds under the provisions of §§ 6-1501–6-1534 for the

acquisition of an electric plant shall, and any municipality now or hereafter owning or operating an electric plant under §§ 6-1501–6-1534, or any other law, may appoint a board of public utilities (hereinafter called the 'board').

"**Section 6-1514. General control of plant.** The general supervision and control of the acquisition, improvement, operation and maintenance of the electric plant shall be in charge of the following agency (hereinafter referred to as the 'supervisory body'): The Board, or if there be no Board, then the governing body of the municipality.

APPENDIX 2.

Tennessee Valley Authority Act:

"Section 831i. Sale of surplus power; preferences; experimental work; acquisition of existing electric facilities.

"The Board is empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the Board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the Board it shall give preference to States, counties, municipalities and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: **Provided**, That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the Board to cancel said contract upon five years' notice in writing, if the Board needs said power to supply the demands of States, counties or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the Board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable; **provided further**, That the Board is authorized and directed to make studies, experiments and determinations to promote the wider and better use of electric power

for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region: **Provided further**, That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this chapter, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board: **Provided further**, That in order to supply farms and small villages with electric power directly as contemplated by this section, the Board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: **And provided further**, That the terms 'States,' 'counties' and 'municipalities,' as used in this chapter shall be construed to include the public agencies of any of them unless the context requires a different construction. May 18, 1933, c. 32, § 10, 48 Stat. 64; Aug. 31, 1935, c. 836, § 6, 49 Stat. 1076."